

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-3086-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSIE WHITE,

Defendant-Appellant,

CAROLYN D. GARLAND,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. A jury found Jessie White guilty of robbery as party to a crime in violation of §§ 943.32(1)(a)¹ and 939.05, STATS. The trial court sentenced him to ten years in prison with 149 days sentence credit.

The state public defender appointed Michael A. Yamat to represent White on appeal. Yamat has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). White received a copy of the no merit report, and he has filed a response.

The no merit report addresses whether the trial court erroneously exercised its discretion by permitting the attorney for White's accomplice to testify and by permitting introduction of a letter written by White to the victim. The no merit report also addresses whether trial counsel was ineffective when counsel stipulated that White had five prior convictions and when counsel did not request a presentence report. Additionally, the no merit report addresses whether White could seek sentence modification. Yamat concludes that these possible issues have no arguable merit. Based upon our independent review of the record, we conclude that his analysis of these issues is correct.

Yamat also addresses the issue of whether the trial court erroneously exercised its discretion when it denied White's motion *in limine* to preclude evidence concerning the accomplice's guilty plea. White objected to the proposed evidence in a pre-trial motion and again at the beginning of the accomplice's testimony. The trial court allowed the evidence, reasoning that it was relevant to the accomplice's credibility.

Yamat concludes that the introduction of evidence concerning the guilty plea was permissible because its purpose related to the witness's credibility. See *Virgil v. State*, 84 Wis.2d 166, 183, 267 N.W.2d 852, 861 (1978). Yamat's analysis is incomplete, however. Evidence can not be admitted to bolster a witness's credibility before credibility is attacked. See *State v. Johnson*,

¹ White was initially charged with violating § 943.32(1)(b), STATS., and this is the subsection listed on the judgment of conviction. At the close of testimony, however, the State moved to amend the information to § 943.32(1)(a). After remittitur of the record, the trial court should correct the judgment of conviction to reflect the correct subsection.

149 Wis.2d 418, 427, 439 N.W.2d 122, 125 (1989). Thus, the trial court's rulings were premature.

We conclude, however, that the error was harmless, because the accomplice's credibility was challenged during her testimony. The accomplice made a statement to police when she was arrested. Shortly before trial, she repudiated her confession and alleged improper police practices during an interview with the defense investigator. Her testimony at trial, for which she was given use immunity, was contradictory. As the trial court later characterized her testimony, she was either "very confused or resistant to answering questions at the end. It was obvious, when we got to the end of her testimony, that she was just saying whatever anybody wanted her to just so she could get off the witness stand."

Both the no merit report and White's response address whether the evidence was sufficient to support a guilty verdict of the crime of robbery. This court will affirm a conviction if it can conclude that a jury, acting reasonably, could be convinced, beyond a reasonable doubt, by evidence the jurors had a right to believe and accept as true. *State v. Barksdale*, 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). The evidence is considered in the light most favorable to the jury's verdict, and the jury is the sole judge of the credibility of the witnesses. See *State v. Toy*, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

Here, part of the crime was videotaped by a passerby, and White admitted that he was involved. The issue was whether the incident was a lover's spat (and a battery) or a robbery. The victim testified that White was a stranger and that he grabbed her from behind, threatened her, and demanded her money. She testified that she gave him money from a check she had just cashed after he attempted to reach into the pocket where she had it. All inconsistencies in the testimony that the victim gave at trial, the preliminary hearing, and White's revocation hearing were fully presented to the jury. The accomplice told the police that she had driven White to a check cashing business so he could select a victim, that White stated he saw which pocket a girl put the money in, and that after driving around according to White's directions, White got out of the car and told her where to meet him. After White returned to the car, he pulled money out of his pocket to count it, and he

said that he hoped he had not hurt the girl. The accomplice's attempted repudiation of the statement was fully explored during her testimony.

White claimed that he had met the victim about two months before the crime and that the two had dated and been intimate. The incident occurred because he was jealous that she had flirted with other men. White's sister testified that White had introduced the victim as his girlfriend several days before the crime. The truthfulness of White's testimony was suspect. He did not know that at the time of the crime, the victim, whose given name was Schynitha, had a two-month-old child, that she had complications from the delivery and was house bound for much of the two months prior to the crime, and that she was known to friends and family by a nickname, Ne-Ne.

Considering the testimony at trial, it was reasonable for the jury to believe the victim and not White. There was sufficient evidence to support the guilty verdict.

The no merit report and White's response also address the issue of whether the trial court erroneously exercised its discretion by sentencing White to the maximum term. White argues that the sentencing guidelines supported a lesser sentence. Deviation from the sentencing guidelines is not a basis for appeal of a sentence, however. Section 973.012, STATS. Further, when reviewing the guidelines, the sentencing court was incorrectly told that White had two, rather than five, prior convictions.

As fully discussed in the no merit report, the court considered the seriousness of the offense, White's character, and the need to protect the public. See *State v. Larsen*, 141 Wis.2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987) (seriousness of the offenses, defendant's character, and need to protect the public are primary factors to be considered by trial court exercising its sentencing discretion). Yamat's analysis of this issue is correct, and there was no erroneous exercise of discretion.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, further proceedings on White's behalf would be frivolous and without arguable merit within the

meaning of *Anders* and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Yamat is relieved of any further representation of White on this appeal.

By the Court. – Judgment affirmed.